

83 | sexual regimes and migration controls: reproducing the Irish nation-state in transnational contexts

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abstract

This article examines the ways that state sexual regimes intersect with migration controls to re-make exclusionary nation-states and geopolitical hierarchies among women. I focus on two important Irish Supreme Court rulings: the X case (1992) and the O case (2002), respectively. X was a raped, pregnant, 14-year-old who sought an abortion in Britain. While the Supreme Court ultimately permitted her to procure an abortion, women's right to travel across international borders without government inquiry into their reproductive status came into question. The O case concerned a Nigerian asylum seeker who invoked the fact that she was pregnant in an effort to avoid deportation. The Supreme Court, however, affirmed that she could be deported, despite the Irish Constitution's pledge to protect the 'right to life of the unborn.' Considered together, these cases reveal how overlapping sexual/migration control regimes both reinscribe hierarchies among women based on geopolitical location, and rebound the exclusionary nation-state despite growing transnationalism.

keywords

sexuality; migration; asylum seeker; transnational; Republic of Ireland; X case

introduction

In January 2002, Ms. I.A.O, a 32-year-old Nigerian citizen, made headlines in the Irish Republic (hereafter Ireland) when she appealed to the High Court to prevent her deportation to Nigeria on the ground that she was pregnant. Her solicitor, deploying pro-life rhetoric, claimed that her deportation contravened Article 40.3.3 of the Irish Constitution, which guarantees that the Irish State will 'defend and vindicate' the 'right to life of the unborn.'¹ Ms. O had entered Ireland in December 1999, claiming asylum on the basis that she feared her life would be in danger if she returned to Nigeria. An official who interviewed her judged her claim to be 'manifestly unfounded'² and that she had deliberately made false or misleading representations about her case. Ms. O appealed the decision, lost, and was issued with a deportation order. She sought and received permission to institute a judicial review of the deportation order, which did not succeed, and a second deportation order was issued against her on 26 October 2001. Ms. O then sought the services of a firm of private solicitors, who appealed her deportation on several grounds including the fact that she had become pregnant. Building on the Irish Constitution's guarantee of the 'right to life of the unborn,' her solicitor argued that 'deporting her to Nigeria, where the mortality rate was 90 per thousand births, compared with 7 per thousand in the Irish Republic, amounted to jeopardizing the life of the unborn child' (Coulter, 2002).

1 Article 40.3.3 states 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.'

2 This is a legal term that results in reduced scope for appealing a negative judgment.

3 These included the arguments that her unborn child was legally a person, and therefore, a deportation order should also have been issued against the unborn child (which it was not); and that Ms. O's asylum claim had not been reviewed according to 'fair procedures' (Carolan, 15 February 2002).

4 Migration includes immigration and emigration.

Other arguments against Ms. O's deportation were also marshalled,³ but it was her solicitor's deployment of claims concerning 'the unborn' that captured the public imagination. When her case went to the Supreme Court, the *Irish Times*' headline announced, 'Status of the Unborn at the Centre of a Plea Against Deportation' (Carolan, 2002). Unfortunately for Ms. O, the Supreme Court, like the High Court, affirmed that her deportation was legal. In this article, I discuss Ms. O's case in conjunction with the history of Irish women's abortion migration, in order to argue that at the site of the women's bodies, state sexual regimes intersect with migration⁴ controls in a manner that reproduces hierarchies among women and exclusionary versions of the nation-state. This occurs despite the growth of transnationalizing processes that have profoundly transformed nation-states. As scholars including Ong (1999) and Westwood and Phizacklea (2000) suggest, transnational processes have reconfigured but not abolished the nation-state's salience in social, economic, and political processes. Similarly, migration scholars observe that even as nation-states open their borders to increasing transnational flows of capital, goods, and information, the control of human migration provides a locus through which nation-states re-bound and 'renationalize' themselves (e.g. Sassen, 1996).

The ways that state sexual regimes figure into these contemporary developments are, however, rarely considered. An analysis of how rebounding of the nation-state frequently operates by subordinating women's sexualities to masculinized,

racialized, capitalist nation-states seems to fall outside the purview of much migration (and transnationalism) scholarship. Similarly, while feminist scholarship has elaborated the significance of women's sexualized bodies for constituting the nation-state, there has been limited discussion of the ways that state migration control regimes in the context of growing transnationalization are central to these processes. This article, therefore, focuses on the imbrications of state sexual regulation with migration controls, in a process that results in the reproduction of hierarchies among women and exclusionary nation-states that are positioned within an unequal global order. It asks what feminist politics is capable of addressing these intersections and their consequences.

reproducing the nation-state through gendered sexual regulation

Feminist scholars have thoroughly documented how nation-states construct their identity and sovereignty through subordinating women's sexuality to masculinized nation-building projects (e.g. Anthias and Yuval-Davis, 1989; McClintock, 1993). As Hyunah Yang explains, 'the nation becomes gendered and women's sexuality becomes nationalized. Nation is equated with the male subject position, and women's sexuality is reified as the property of the male nation' (Yang, 1998: 130). Nation-building entails the imposition of heteropatriarchal logic in which women's sexuality is 'perennially colonized within reproduction and heterosexuality' for the masculinized nation-state (Alexander, 1997: 64; see also Berlant, 1997; Smyth, 2005). Women who fail to subordinate their sexuality to heteropatriarchy – including single mothers, lesbians, sex workers, and others – find themselves marginalized within the nation-state, and are often the targets of intervention or criminalization. Heteropatriarchy mandates not only sexual and gender, but also racial and ethnic, hierarchies; as Anthias and Yuval-Davis (1989) explain, women are expected not only to reproduce the collective's members through childbearing and mothering, but to do so in a manner that recreates the boundaries of the racial, ethnic, and/or national collective by having sex with men who are deemed racially/ethnically appropriate. While women of the majority group are exhorted to bear children within heteropatriarchal marriage with 'appropriate' men, racial/ethnic minority women find that their childbearing is often marked as a threat by the state, and controlled, prevented, or demonized accordingly (see Anthias and Yuval-Davis, 1989; Roberts, 1997). Heteropatriarchal marriage also centrally organizes the transmission of property in ways that maintain unequal economic relations (Cott, 2000).

This analysis of the connections between nation-building and female sexual subordination certainly applies in Ireland where, as Ailbhe Smyth argues, 'control of women's sexuality and reproduction has been high on the Irish political agenda

5 See also Innes (1993), Meaney (1991), Ryan (2002: 53).

since the foundation of the State' (Smyth, 1996: 121).⁵ In 1922, after military struggle against British rule, Ireland became partitioned into a Free State (the southern 26 counties) and the North, which remained under British rule. In this postcolonial context, 'the overwhelming push to define Ireland as 'not-England' led to a search for distinguishing marks of identity,' of which women's reproductive sexuality became key (Mullally, 2005: 82). The 1937 Constitution positioned women as mothers and childbearers located within the private home, and this construction involved a claim of moral superiority over the former colonial master. Article 41.2.1 of the Constitution says that 'the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.' Consequently, according to Article 41.2.2, 'The State shall ... endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.'

6 The term 'settled' refers to non-Traveller people who are privileged as a result of their settled, non-nomadic status. Travellers are a distinct, racialized group in Ireland, who endure ongoing and systemic discrimination (see O'Connell, 2002).

7 'White' is a term that is generally applied to people with 'light' coloured skin and 'European' features. Yet, whiteness is by no means reducible to these phenotypical characteristics; for example, in the Irish Republic, Travellers generally share these characteristics but remain subjected to racism and are not seen as representative of the nation (see Ní Shúinéar, 2002).

8 As scholars observe, the fact that pro-life rhetoric is associated with

This gender and sexual order, in turn, presumed and institutionalized a specific economic and ethnic/racial logic. A particular vision and version of Irishness as race/ethnicity was enshrined in the Constitution, one that conceived Irish women as settled,⁶ Catholic, and 'white.'⁷ Recent scholarship draws attention to the fact that 'immigrants, Black Irish, Jewish, Traveller, and Muslim people, among others, are not considered Irish,' or included within most official nationalist representations, including representations of reproduction of the nation through childbearing (Sinha, 1998: 24; see also Lentin, 1998). As we will see in more detail below, these exclusionary representations became the basis on which the nation became materially ordered. Laury Oaks powerfully captures the centrality of reproductive sexuality to Irish nation-building processes: 'in Ireland, [women's] reproduction is a medium through which competing national origin stories that focus on Irish national identity and cultural self-determination, indeed versions of 'Irishness' itself, are imagined and expressed' (Oaks, 1998: 133).

Gaining access to contraception and abortion has been central to women's efforts to assert some degree of control over their own bodies within this heteropatriarchal context.⁸ Abortion has been illegal in Ireland since the Offenses Against the Person Act, which passed in 1861 while Ireland was under British rule (Hug, 1999). In 1974, the Irish Supreme Court recognized the right to marital privacy, and anti-abortionists feared that this decision might open the door to the legalization of abortion, as had happened in other countries such as the US (Mullally, 2005).⁹ This led to a bitter campaign, and a referendum that resulted in the eighth amendment being added to the Constitution. This is Article 40.3.3, which states 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.' This was the article that was invoked in the Baby O case. That Ireland does not allow abortion has become an important means through which a strongly moral

national identity has been constructed. Mullally affirms: 'the definition of Ireland in exclusively pro-life terms served as another distinguishing mark of Irish identity' (Mullally, 2005: 83).

Migration controls, as much as sexual regimes, significantly construct the ideological and material boundaries of the nation-state. Indeed, the control of migration is typically viewed as an uncontested expression of national sovereignty. In Ireland, emigration rather than immigration was the single most important fact of Irish life for nearly two centuries (O'Tuathaigh, 1991: 9). As Mac Laughlin argues, high rates of emigration have 'long been linked to the process of class formation and capitalist development in Ireland' (Mac Laughlin, 1997b: 6), and crucially enabled the formation and consolidation of a nationalist bourgeoisie (Mac Laughlin, 1997b: 13; see also Lee, 1989: 374). After independence, sustained emigration continued. Such high emigration appeared to reflect the failure of the nationalist project to generate a viable livelihood for many, and the government therefore developed strategies for explaining emigration in a manner that exonerated it from responsibility (Lee, 1989: 374; Mac Laughlin, 1997b). Relatively few government interventions, however, were designed to control the outflow of people.¹⁰

An intimate connection existed between emigration and the nation-state's gender and sexual order. As Tom Inglis describes,

in the supposed cycle of events after the Famine [of 1845–1849], the segregation of the sexes led to the control of sex. The control of sex helped the control of marriage. The control of marriage helped the control of population and, finally, the control of population helped improve the overall standard of living. ... The strategy of increasing the standard of living through controlling population growth was thus based on restricting the numbers of sons and daughters who could get married.

(Inglis, 1998: 33)

Emigration emerged as the prescribed mechanism for sustaining this sexual order. 'In most families those sons and daughters not selected for marriage had a choice of remaining sexually inactive, or emigrating' (Inglis, 1998: 34). It would be hard to overstate how central emigration remained to the Irish sexual system of the nineteenth and twentieth centuries. As late as the 1960s, an anthropologist studying the Irish could write, 'Young people who anticipate emigration have transferred any expectation of sexual gratification ... to cities far from home. Equally, those who have decided to stay at home do so in the full realization that the decision certainly entails a life of chastity' (cited in Inglis, 1998: 31).

Emigration also emerged as a crucial mechanism for negotiating strict sexual codes, including for women pregnant outside of marriage (Ryan, 2002; Earner-Byrne, 2004), or engaged in same-sex relationships (Luibhéid, 2000), or fleeing incest (O'Carroll, 1995). Single Irish women who were pregnant 'emigrated to

postcolonialism contributes to the difficulty of challenging it (see Fletcher, 2001).

9 The right to marital privacy was recognized in *McGee v. Attorney General* [1974] I.R. 284.

10 For a discussion of state planned migration schemes that were intended to facilitate emigration from Ireland, see Duffy (2004). According to Duffy, after independence, the few government efforts that were intended to facilitate either emigration or relocation within the national territory remained shrouded in secrecy. Note that other groups beside the state, including landlords, philanthropists, and the churches, played important roles in facilitating emigration.

11 Earner-Byrne relates that 'repatriation as a tool of reversal or change was utterly unsuccessful because it responded only to the symptoms not the causes of this prenatal emigration' (2004: 172). Causes that Earner-Byrnes (2004: 170) names include extreme social rejection; discrimination; likelihood of being detained in an institution; being held liable for the cost of one's child's maintenance in an institution; being subjected to religious manipulation; and being viewed as a financial and moral burden.

12 Note, 'Irish women have also had abortions in other European countries; in the United States, in Canada, Australia, New Zealand' (Ruane, 2000: 10).

Britain in significant numbers during the twentieth century' (Earner-Byrne, 2004: 155). This form of emigration was widely recognized and critically debated, but the state generally turned a blind eye (Earner-Byrne, 2004: 156). Only in the 1930s, under considerable pressure, did the state actively respond by sanctioning a repatriation programme for pregnant unmarried Irish women in Britain.¹¹ According to Earner-Byrne, 'the history of this emigration forms a vital part of what has become known as 'the abortion trail'' (Earner-Byrne, 2004: 155).

The abortion trail concerns Irish women facing unwanted pregnancies who have travelled to England and elsewhere for abortions, resulting in a recognizable 'abortion migration' history. Many scholars suggest that abortion migration dates from 1967, when abortion was legalized in Britain. Pauline Jackson, however, argues that Irish abortion migration to England dates from around 1937, when the UK's *Rex v. Bourne* case opened the door to abortion under certain circumstances (Hug, 1999). With the passage of the British Abortion Act of 1967, Irish women's migration to Britain for abortions became more thoroughly institutionalized, even though 'for many women [such travel] is a huge hurdle, involving financial strain, distress and fear, [and] unknown places in an often unknown country' (de Burgh, 2000: 5).¹²

Having to travel to Britain for an abortion drives home for Irish women that they are subordinated citizens within the dominant construction of the nation. Ellen, an Irish woman who had been living in Germany, became pregnant, sought an abortion, and returned to Ireland. She describes:

I was faced with the fact that I had done something which divided the country. ... In Ireland I became one of those questionable women who'd had an abortion, in Germany I had been a responsible young woman who had dealt with a difficult situation. In Ireland it was something which could hurt others, make others ashamed of me, it was something upon which I would be judged and found wanting. It felt strange to have done something which was so condemned and considered so wrong but which was so right for me.

(Irish Family Planning Association, 2000: 35, 37)

Continuing abortion migration reflects the existence of a state sanctioned sexual regime that subordinates women's bodies to childbearing within patriarchal marriage, while denying access to abortion within the territory of the nation-state. As with the emigration of unmarried mothers, the state has largely turned a blind eye to this form of migration and the social conditions that generate it. In 1992, however, the X case brought these matters into the public spotlight.

X was a 14-year-old Irish girl, pregnant as a result of rape, whose parents brought her to Britain for an abortion. The Attorney General of Ireland issued an injunction against them, and they returned to Ireland without X having procured an abortion. The case was widely covered in the international media, in a manner that generally condemned Ireland. 'The international media reported Ireland to be 'backward,' 'barbarous,' 'punitive,' 'priest-ridden' – a portrayal that did not

sit well with a modernizing image of an emerging Celtic Tiger economy' (Mullally, 2005: 92). 'Fearing an adverse impact on market forces and the image of Ireland abroad, the government actually volunteered to pay the costs of the Supreme Court appeal, so anxious were they to have the issue resolved' (Murphy-Lawless). Demonstrations in support of X were held in major cities throughout Ireland, as the public was galvanized by her circumstances. In March 1992, the Supreme Court ruled that X could procure an abortion, given that she was suicidal, which represented a threat to her life.¹³

But in the Supreme Court decision, 'the right of a pregnant woman to travel outside the country was contested 3–2 and was not seen as an inalienable right' (Murphy-Lawless; see also Conrad, 2004). Travel by a pregnant woman seeking an abortion 'had never been thought illegal before in Ireland, as [Irish law that criminalizes abortion] does not normally have effect outside the jurisdiction' (Reid, 1992: 26). Three of the five Supreme Court justices ruled in X, however, 'that the implicit right to travel which the Irish Constitution confers on citizens was subordinate to the courts' duty to protect the right to life of the foetus' (Reid, 1992: 26). The possible consequences of this ruling were serious: 'the potential restriction on women's freedom of movement, and with it, the spectre of anti-abortion groups seeking injunctions to restrain pregnant women from travelling abroad, provoked widespread protests' (Mullally, 2005: 93). These included a pro-abortion protest at Dublin airport 'where an "X-ray machine" was used to screen female "passengers" to England. Those found to be pregnant were not allowed to board planes and were "taken into State custody"' (Oaks, 1998: 140). This demonstration dramatized the question of whether and how the state could inquire into women's reproductive status, and adjudicate their migration accordingly. Feminist concerns about women's ability to travel were not unfounded; Angela, who found herself unexpectedly pregnant and who decided to seek an abortion in England, describes that 'those were the days when anti-abortionists were doing everything to stop women from getting to England. I had nightmares that somehow they would stop me before I got to England and force me to continue the pregnancy' (Irish Family Planning Association, 2000: 23). Angela's experience demonstrates the interweaving of sexual and migration controls in the production of the nation-state.

As the X Case unfolded, it emerged that the Irish government had, in 1991, secretly appended a Protocol to the Maastricht Treaty, stating that 'no act or amendment at European level could supersede the 1983 Amendment to the Irish Constitution. In other words, this Protocol denied Irish women recourse to European Community law to overrule the Irish Constitution' on matters of abortion restriction (Murphy-Lawless). 'In June 1992, the Irish electorate had to vote whether to accept a Maastricht Treaty with this Protocol, in the face of all the uncertainty and potential for change that the Supreme Court ruling had opened up' (Murphy-Lawless). Some women's groups urged a 'no' vote, because

13 'The Supreme Court lifted the injunction, reversing the High Court's ruling on the substantive question of abortion. Pointing out the state's duty to have 'due regard' for the life of the mother, the Supreme Court concluded that abortion was lawful in Ireland when there was a 'real and substantial risk' to the life, as distinct to the health, of the mother' (Mullally, 2005: 92).

14 For example, see Oaks (1998).

15 Oaks importantly continues, 'as changes have transformed the meaning of Irishness, so too have 'European' identities been explicitly reformulated within and across the European Union ...' (Oaks, 1998: 149).

16 Contrary to claims about supranational citizenship, this structure reinforced rather than eroded the importance of holding citizenship in a member nation.

they argued that Maastricht with the Protocol was not in the best interests of women. Anti-abortion groups also urged a 'no' vote, on the ground that Europeanization allowed EU institutions (especially courts) to interfere in Irish affairs, including on matters of morality and sexuality, in ways that eroded Irish national sovereignty and distinctiveness.¹⁴ As Oaks summarizes, 'the extreme publicity of the interrelationship between abortion politics and the meaning of Irish membership within the European Union created a different space for the presentation of competing sorts of Irishness at a time when 'nation' itself [was] being transformed within the New Europe' (Oaks, 1998: 149).¹⁵

Maastricht not only demonstrated the interweaving of abortion politics with national distinctiveness in a context of transnationalization; it was also centrally concerned with nation-state immigration controls. Ironically, the Maastricht Treaty was intended to open up migration among the countries and citizens of the EU – even as the Irish government's Protocol to the Treaty, in conjunction with the uncertainties caused by the Supreme Court decision in *X*, potentially jeopardized the ability of Irish women of childbearing age to travel across international borders. To facilitate migration among EU countries, the Maastricht Treaty introduced EU citizenship, which 'derived from holding citizenship in a member state and thereby complementing, rather than replacing, national citizenship' (Geddes, 2000: 101).¹⁶ However, while Maastricht opened up migration for EU nationals, it contributed at the same time to further restricting and criminalizing migration by non-EU nationals, including asylum seekers like Ms. O (see Geddes, 2000; Jordan and Düvell, 2004).

The Irish government, eager for the public to ratify Maastricht and concerned that the *X* case and revelations of the Protocol might derail that process, 'made a Solemn Declaration to try to mitigate the effects of their own Protocol. They promised a separate referendum on abortion travel and information, and the Treaty was passed' (Murphy-Lawless; see also Conrad, 2004: 106–107; Smyth, 2005). In November 1992, the promised referendum on abortion took place, and it involved three different issues. 'Two of the proposed constitutional amendments – guaranteeing pregnant women's freedom to travel abroad and limited rights to the circulation of information about abortion services – were voted into the Constitution in this referendum. A third amendment, proposing a more limited right to abortion than that already allowed by the Supreme Court, was rejected' (Smyth, 1996: 111). Therefore, women who remain subjected to the state's anti-abortion laws at least secured a constitutional guarantee that the state would not prevent them from travelling abroad to procure abortions, should they decide to do this. This guarantee exists side-by-side with the post-Maastricht regime that is intended to facilitate, even generate, migration among EU countries including by Irish citizens.

The events described above show that while anti-abortion policy remains a critical marker of Irish national distinctiveness, the state has been forced to

renegotiate the extent and meaning of anti-abortionism in relation to the larger transnational context of EU membership, including the state's desire to encourage ratification of the Maastricht Treaty. Moreover, they show how the state's pro-life stance came to involve questions about the possibility of governmental regulation of Irish women's migration across international borders, based on their reproductive status.

asylum seekers, abortion rhetoric, and Irish national distinctiveness

The troubled intersections of state sexual regimes with migration controls emerged in new form in the late 1990s. At that stage, Ireland's economy was booming, and the state confronted the need to respond to unprecedented levels of immigration into (rather than emigration from) the territory. The Irish government set about developing laws and administrative procedures to manage immigration. These management strategies were viewed as a legitimate expression of national sovereignty.

The construct of national sovereignty, however, and the immigration controls that it authorizes, require critical historical contextualization. As scholarship shows, European sovereign nation-states became consolidated through processes of colonialism and capitalism on a global scale (Castles and Davidson, 2000). The nation form provided a mechanism to extract resources from colonized peoples, and to shield these resources from distribution beyond the boundaries of the designated citizenry. In this sense, the nation state form has been a crucial mechanism through which material inequalities were constructed and maintained on a global scale. Immigration policies that are framed strictly within the horizon of the nation-state, and that thereby fail to address the ways that immigration is driven by unequal global processes, extend the history of the nation form as a mechanism for reproducing inequality (see Mongia, 1999).

For centuries, Ireland remained among the colonized and under-developed regions of the world. After independence, however, it sought integration into the global economy on terms that affirmed, rather than challenged, structural hierarchies (Allen and Loyal, forthcoming). When increasing numbers of immigrants began seeking entry into Ireland in the 1990s, policy makers and the public generally failed to acknowledge that this migration was substantially driven by global dynamics in which Ireland played a distinct role. Instead, immigration was largely framed as a matter of individuals' 'rational choice' decision-making. Within this framework, acceptance of immigrants became a matter of either humanitarianism or else selecting migrants who were deemed 'good' for the nation (on economic, cultural, racial, or other grounds). This

reasoning placed immigration control in the service of reproducing the bourgeois, heteropatriarchal, racist nation-state.

Mechanisms for managing immigration significantly pivoted on the creation of administrative categories, to which tiered rights and possibilities were linked. As Allen and Loyal describe, 'the main polarity in the state's categorization of migrants is between asylum seeker/refugee and economic migrant' (Allen and Loyal, forthcoming). According to the 1951 Geneva Convention, asylum seekers are people who are unable or unwilling to return to their countries of origin or habitual residence because they fear persecution on the grounds of race, religion, nationality, membership in a particular social group, or political opinion. The Irish Refugee Act 1996 further states that persecution on the basis of membership in a trade union, gender (being female and male – but not necessarily being transgender), and sexual orientation may provide a basis for gaining asylum. Historically, Ireland was not a major asylum seeker destination. In 1992, just 39 people applied for asylum. But as the numbers grew,¹⁷ 'Ireland aligned itself with current EU policies whose primary [goal] was to reduce the number of "uneconomic" asylum seekers' (Allen and Loyal, forthcoming). Successive redefinitions of who could qualify as an asylum seeker, evident not only in law but also in policy and practice, allowed the Irish state to become more restrictive while appearing to adhere to humanitarian goals. As Liisa Malkki (1995) argues, asylum seekers are not a distinct 'type' of person; rather, governmental processes ultimately determine whether or not someone becomes officially classified as an asylum seeker. As the Irish state sought to limit entry by asylum seekers, it did so not only by trying to pre-empt their arrival in the first place but also by bureaucratic means that invalidated increasing numbers of asylum claims. Bureaucratic invalidation was backed up by a growing discourse that differentiated asylum seekers into 'bogus' versus 'genuine' (Fanning, 2002: 24–25, 101, 105; McGee, 2003: 197), and claims that a majority of asylum seekers were, in fact, 'bogus.' The 'bogus'/'genuine' distinction was often produced by the state's own administrative procedures, rather than by the qualities and experiences of asylum seekers themselves (Garner, 2004). Yet, the state's role in producing that distinction, and the ways that distinction serves an exclusionary nation-state agenda, became lost in public debates and policy decisions.

17 By 2002, nearly 12,000 people applied for asylum in Ireland.

In response to these developments, asylum seekers sought ways to circumvent the state's exclusions. Birthing a child on Irish soil emerged as one critical means to challenge the state's exclusionary regimes, for two reasons. First, until 2005, Ireland offered birthright citizenship, which meant that anyone born on Irish soil was an Irish citizen (Mullally, 2005; Smyth, 2005). Second, in the 1990 *Fajujonu* case, the Supreme Court ruled that Irish citizen children were entitled to the care and company of their parents, within the Irish nation-state, even when these parents were non-nationals.¹⁸ As a result, increasing numbers of asylum seekers abandoned their asylum claims after giving birth in Ireland, and instead

18 For details of this case, see

sought residency based on their parentage of an Irish child.¹⁹ Consequently, asylum seekers' childbearing emerged as extraordinarily controversial. The Minister for Justice and sectors of the media repeatedly claimed that asylum seekers were using childbearing to bypass immigration controls, thereby undermining national sovereignty while multiplying the number of alleged welfare dependents (Luibhéid, 2004). Asylum seeker women in particular became reduced to their sexualized, racialized reproductive organs that, as Nozinic describes, 'they are said to 'use' ... in order to abuse the system' (Nozinic, 2002: 82).

O'Connell and Smyth (2003).

19 Note, in the *L&O* decision, delivered on 23 January 2003, the Supreme Court substantially altered *Fajjonu* in ways that opened the door for the deportation of non-national parents of Irish children.

contesting deportation through the 'right to life of the unborn'

In this context of heated public debate about the intersection of women's sexualities with migration controls, Ms. O filed to prevent deportation. Since she was pregnant but had not given birth, her solicitor argued that the Constitution's commitment to 'defend and vindicate' the 'right to life of the unborn' should invalidate the deportation order against her. However, the government's and courts' responses show how these pro-life discourses and practices became reworked in ways that reproduced and stabilized a distinction between 'bogus' and 'genuine' asylum seekers, thereby harnessing the pregnant bodies of non-national women in service to exclusionary immigration control regimes.

The government's response denied that the Constitutional commitment to 'defend and vindicate' the 'right to life of the unborn' had any application to Ms. O's situation. In the High Court, the State's counsel argued that the woman was not claiming that she faced medical complications associated with the pregnancy, or a specific threat to her life (and therefore to the life of her unborn child) upon return to Nigeria. Rather, counsel argued, 'however dressed up it was, the claim was unfounded. What was being said was that while the claim was being processed, the woman became pregnant and the health service in Ireland was better than the health service in Nigeria (Newman, 2002)'. The High Court concurred that 'in the absence of any adverse medical condition of the mother's, the right to life of the unborn, as enshrined in Article 40.3.3 of the Constitution, was not an issue in the case (Carolan, 2002)'. The Supreme Court affirmed the High Court's judgment:

The paragraph in Article 40.3.3 on which Counsel relied ... was intended to prevent the legalisation of abortion either by legislation or by judicial decision within the State, except where there was a real and substantial risk to the life of the mother which could only be avoided by the termination of the pregnancy. In this case, neither the State nor any of its organs was seeking to terminate [Ms. O.]'s pregnancy and the fact that the standard of ante- or post-natal care

available to her in Nigeria was less than would be available to her in this country was entirely irrelevant to the legality of her deportation.

(Supreme Court of Ireland Decisions)

These decisions make clear that the State's commitment to defending and vindicating the right to life of the unborn involves a circumscribed realm: the state will prevent abortion, and possibly intervene if medical complications threaten a pregnancy or if a woman convinces them that she faces a serious threat to her life on being returned to her home country. But otherwise, the State has no responsibility with regard to the life of the unborn. As Mullally writes, 'the threat imposed by higher infant mortality rates could not invoke the protection of Article 40.3.3. The state's duty to defend and vindicate the right to life of the unborn did not extend to ensuring the health and well-being of Baby O, or even ensuring a safe delivery' (Mullally, 2005: 101).

Moreover, even though the mother's circumstances would significantly shape the baby's possibilities in life, the state claimed that it had no further responsibilities toward Ms. O either, since her asylum claim had been duly considered by state representatives and was found to be lacking in merit. Indeed, they judged her to have engaged in offering falsehoods during the asylum process, and denied refugee status to her.

By reframing Ms. O not as a woman deserving of state protection for her unborn child, but as an economic migrant who engaged in falsehoods and attempted to manipulate the asylum system to secure residency in Ireland, the state and courts re-stabilized the state's distinction between a 'genuine' refugee and a 'bogus' asylum seeker who was merely an economic migrant. In other words, their strategy suggested that the distinction between 'genuine' and 'bogus' asylum seekers stemmed not from the government's own shifting methods for adjudicating asylum claims, but from qualities and characteristics of individual migrant bodies, which the government could reliably assess. Their argument, which responded to Ms. O's solicitor's claims regarding 'the unborn,' rendered pregnancy itself as a site through which the 'genuine'/'bogus' distinction could be adjudicated.

Moreover, the state's arguments affirmed the need to police against migrant populations in general, and 'bogus' asylum seekers in particular, while at the same time sidestepping larger issues. For example, as described above, migration flows are substantially driven by longstanding global inequalities. Ifekwunigwe (2004: 406–407) writes in regard to African migrants in Europe that they

are part of the latest global forced migration system, which in turn grew out of the earlier globalizing phases of transatlantic slavery and Empire (Narayan, 1997). They represent what Catherine Hall describes as a 'reconfiguration of colonial relations' wherein the North and South are still connected by sinews of inequality and subordination.

Migration and asylum policies that fail to substantively address these root inequalities, and instead use migration controls in service to neoliberal capitalist, masculinist, racial states, contribute to maintaining these global hierarchies. The Irish government's creation of a distinction between 'genuine' and 'bogus' asylum seekers – which mirrors the distinctions used in other EU countries – constitutes one crucial mechanism through which these global hierarchies are maintained and legitimized through the migration control system.

The O ruling, which re-stabilized the state's distinction between a 'genuine' and a 'bogus' asylum seeker, inevitably resulted in affirmation of Ms. O's deportation. Deportation, a form of forced migration that is imposed on an individual by the state, remains the ultimate expression of national sovereignty and an important mechanism for re-bordering the nation-state. Ms. O's solicitor highlighted her pregnancy precisely in an effort to prevent her forced migration through deportation. His use of anti-abortion rhetoric was powerful enough to temporarily pause the deportation process. The State and judiciary understood that her claim (like Ms. X's) had implications not just for an individual woman but for all women. Thus, in its submission to the High Court, the State pointed out that if Ms. O's case succeeded, the implication was that 'no woman of childbearing age who could assert that she was pregnant could ever be deported' (Coulter, 2002). Although the High Court rejected Ms. O's appeal, Justice Smyth nonetheless certified

that his decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to [the Supreme Court], the point of law being whether the Minister [for Justice] has the legal right or entitlement to deport a person who had failed to secure a declaration of refugee status from the State because she alleges she is, or is, pregnant.

(Supreme Court of Ireland Decisions)

In the Supreme Court, Ms. O's counsel 'conceded that, if his submission were well-founded, it would necessarily follow that every woman or girl of child bearing age would have to submit to pregnancy testing before she was deported or extradited to a country with less developed pre- and post-natal services than are available in this country' (Supreme Court of Ireland Decisions). In his ruling, Justice Keenan wrote indignantly, 'No such gross violation of the privacy of women and girls could possibly have been intended by the enactment of Article 40.3.3 of the Constitution' (Supreme Court of Ireland Decisions).

Yet, the government clearly had, for some time, been concerned about the nexus between non-national women's pregnancy, migration across international borders, and nation-making. The fact that childbearing enabled some asylum seekers to secure residency heightened the concern. For example, Mr. Jim O'Keeffe, the Justice spokesman for the political party Fine Gael, wondered aloud

during parliamentary debates, 'Women who are heavily pregnant are allowed to board aeroplanes. Can we introduce further restrictions in that regard?' Without any apparent sense of irony, the Minister for Justice responded, 'pregnant women have rights too' (O'Halloran, 2004). Yet, just one week earlier, that same Minister published a statement in the *Sunday Independent* regretting that 'to require non-national women of childbearing age to make declarations of pregnancy or otherwise when arriving in the State is clearly unworkable' (McDowell, 2004). It did not seem to occur to these officials that there was anything questionable about governments inquiring into women's reproductive status and circumscribing their mobility accordingly.

conclusion

Taken together, the X and O cases reveal a great deal about the complex inter-relationships between state migration control policies, state sexual regimes, and how national borders – with their resulting hierarchies among women – are continually remade in the context of transnationalism. The two cases connect to larger changes that have been occurring in how Ireland governs migration. Until the 1990s, Ireland was concerned mainly with migration by those who were leaving the country, and paid relatively little attention to those who were entering. The Maastricht Treaty, however, was a crucial element in creating an integrated EU, through which mobile capital and mobile European bodies move with relative ease. The Irish government has eagerly participated in the project of Europeanization, particularly as a means to achieve economic growth, and therefore, it has participated in fostering mobility across the borders and outside the country by its citizens.

At the same time, the mobility of other people, especially asylum seekers, has been systematically de-fostered, disabled, disallowed, and increasingly criminalized. Growing restrictions on asylum seekers' mobility post-Maastricht are complemented by deportation – a form of forced travel that expels them from the states where they have sought asylum. Yet, despite these restrictions, European integration and transnational capital have nonetheless also called into being mobile subjects like Ms. O, for whom new migration possibilities both emerge and become newly necessary, regardless of official European restrictions.

Therefore, reading the X and O cases side by side makes clear that official regimes for governing mobility in the post-Maastricht era position women like Ms. O versus women holding Irish and EU citizenship very differently. This differential positioning is relational, in the sense that mobility for one is thoroughly implicated in growing criminalization and immobilization for the other. Thus, official regimes for governing mobility reiterate national origin as a source of hierarchy and distinct inequality among women – despite transnationalization processes.

These points, of course, also hold true for men. So what is additionally important about the X and O cases is the ways that they highlight women's reproductive sexuality as a critical element in these developments. In both X and O, the question arose as to whether the Irish government could or should inquire into women's pregnancy status, and regulate their mobility accordingly. In both cases, the answer was eventually negative. But that common answer emerged through quite different considerations. With X, concerns about the transnational – especially about the possible impact of negative international opinion on economic development – shaped the final resolution to the case. Other important factors were feminist mobilizations, and concern that the international community might see Ireland as lesser than, rather than equal to, the rich and powerful nations.

In the O case, it was also decided that the government should not inquire into women's reproductive status and regulate their mobility accordingly. But that decision emerged through a very different set of concerns. Unlike in X's case, Ms. O's solicitors actually argued that her mobility *should* be mediated through government consideration of her pregnancy. This troubling claim was couched in the powerful language of the pro-life state, and ironically, if accepted, the result would have been *positive*, not only for Ms. O but also for potentially thousands of migrant women. The government's rejection of Ms. O's claim was couched in terms of a very narrow reading of what constitutes a pro-life position, and also in terms respecting women's 'privacy,' and these in turn were harnessed to discourses and practices of immigration and asylum law. The impact for Ms. O and for migrant women more generally was to foreclose opportunities and possibilities for legalizing their presence in the state, or for securing opportunities for their children.

Through these processes, state reproductive politics directed toward controlling the sexualities of Irish citizen women became clearly differentiated from state politics concerning the sexual control of non-national women, especially asylum seekers. Through women's reproductive sexuality, the state re-drew and re-stabilized the line between national and non-national women, and, within the latter group, the line between 'bogus' and 'genuine' asylum seekers. Effectively, the state turned women's sexualities into a tool for racialized strategies of immigration control, which rebounded the Irish nation-state in the context of transnationalism.

Ms. O's case demonstrates that the pregnant bodies of non-national women provide particularly powerful loci through which the state both extends and legitimizes its exclusionary immigration practices. Since Ms. O's deportation, the invocation of pregnant asylum seeker women's bodies to extend and legitimize exclusion has intensified. For example, in January 2003, in *Lobe and Osayande v. Minister for Justice*, the Supreme Court effectively overturned the *Fajujonu* decision by ruling that the Minister for Justice could deport non-national parents

of Irish children in the interests of 'the common good,' including the state's right to control immigration (see O'Connell and Smyth, 2003). In June 2004, after alarmist accounts about pregnant migrant women who allegedly engaged in 'citizenship tourism' by travelling to give birth to children on Irish soil, the Irish electorate overwhelmingly approved a referendum that ended the practice of birthright citizenship. In these instances, non-national women's sexualities occasioned the re-bounding of the nation-state and the tightening of exclusionary immigration laws.

What feminist sexual politics would be capable of linking the exclusion of pregnant asylum seeker women to the sexual subordination of Irish women (as reflected by their continuing abortion migration), and challenging both? Until such politics develops, Irish and EU feminists remain implicated in the state's ongoing differentiation and hierarchization of women by nationality, and the resulting reproduction of heteropatriarchal, racialized, economically exploitative nation-states in the context of global inequality.

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